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No. 00-617

In the Supreme Court of the United States

INTERNATIONAL AIRCRAFT RECOVERY, L.L.C.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a salvor of a United States military aircraft may assert ownership rights over the wreck when the government has not expressly abandoned it.

2. Whether a United States military aircraft lost at sea that has not been abandoned may be salvaged without the consent of the government.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	16

TABLE OF AUTHORITIES

Cases:

California v. *Deep Sea Research, Inc.*, 523 U.S. 491 (1998)	6, 7, 11
Cobb Coin Co. v. *Unidentified, Wrecked & Abandoned Sailing Vessel*, 525 F. Supp. 186 (S.D. Fla. 1981)	15
Columbus-America Discovery Group v. *Atlantic Mut. Ins., Co.*, 974 F.2d 450 (4th Cir. 1992), cert. denied, 507 U.S. 1000 (1993)	13
Columbus-America Discovery Group, Inc. v. *Atlantic Mut. Ins., Co.*, 203 F.3d 291 (4th Cir.), cert. denied, 121 S. Ct. 277 (2000)	10
Fairport Int'l Exploration, Inc. v. *The Shpwrecked Vessel*, 177 F.3d 491 (6th Cir. 1999)	13
Hatteras, Inc. v. *USS Hatteras*, 1984 A.M.C. 1094 (S.D. Tex. 1981), aff'd, 698 F.2d 1215 (5th Cir.), cert. denied, 464 U.S. 815 (1983)	9
Jupiter Wreck, Inc. v. *Unidentified, Wrecked & Abandoned Sailing Vessel*, 691 F. Supp. 1377 (S.D. Fla. 1988)	14, 15
Lathrop v. *Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953 (M.D. Fla. 1993)	14
Legnos v. *M/V Olga Jacob*, 498 F.2d 666 (5th Cir. 1974)	15
MDM Salvage, Inc. v. *Unidentified, Wrecked & Abandoned Sailing Vessel*, 631 F. Supp. 308 (S.D. Fla. 1986)	15

Cases—Continued: Page

New Harbor Prot. Co. v. *Charles P. Chouteau*, 5 F. 463 (D. La. 1881) 14
Platoro Ltd., Inc. v. *Unidentified Remains of a Vessel*, 695 F.2d 893 (5th Cir.), cert. denied, 464 U.S. 818 (1983) 13
R.M.S. Titantic Inc. v. *Haver*, 171 F.3d 943 (4th Cir.), cert. denied, 528 U.S. 825 (1999) 13
Royal Indem. Co. v. *United States*, 313 U.S. 289 (1941) 9
Sea Hunt, Inc. v. *The Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000), petition for cert. pending, No. 00-652 ..... 10, 14
The Davis, 77 U.S. (10 Wall.) 15 (1869) 11
The Indian, 159 F. 20 (5th Cir. 1908) 13
The Lottawanna, 88 U.S. (21 Wall.) 558 (1875) 10
Treasure Salvors, Inc. v. *Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir. 1981) 13, 15
United States v. *California*, 332 U.S. 19 (1947) 9
United States v. *Steinmetz*, 973 F.2d 212 (3d Cir. 1992), cert. denied, 507 U.S. 984 (1993) 9
Yukon Recovery LLC v. *Certain Abandoned Prop.*, 205 F.3d 1189 (9th Cir.), cert. denied, 121 S. Ct. 62 (2000) 10, 14

Constitution and statute:

U.S. Const., Art. IV, § 3, Cl. 2 (Property Clause) 9
Amend. XI 11, 15
Abandoned Shipwreck Act of 1987, 43 U.S.C. 2101 *et seq.* 7

Miscellaneous:

Martin J. Norris, *The Law of Salvage* in 3A *Benedict on Admiralty* (rev. 7th ed. 1999) 13

Miscellaneous—Continued: Page

Letter from W.S. Dudley, Dir. of Naval History, to Douglas L. Champlin, President of Historic Aircraft Recovery, Inc. (Jan. 24, 1992) 3

Letter from Damon C. Miller, Trial Attorney, to David Paul Horan, Attorney at Law (Feb. 9, 1995) 4

Letter from Bernard Murphy, Federal Preservation Officer, to Milan Slahor, Attorney at Law (June 25, 1993) 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 218 F.3d 1255. The opinion of the district court (Pet. App. 20a-43a) is reported at 54 F. Supp. 2d 1172.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2000. The petition for a writ of certiorari was filed on October 16, 2000 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a private party's right to salvage a rare and historically valuable United States naval aircraft that crashed approximately eight miles off the coast of Florida in 1943. The aircraft is a United States Navy "Devastator" TBD-1 torpedo bomber manufactured by the Douglas Aircraft Company and delivered to the Navy in 1938. It was assigned to the aircraft carrier Yorktown and flew combat missions in both the Battle of Midway and the Battle of the Coral Sea. After its combat tour, the aircraft was reassigned to the Atlantic Training Squadron at the Naval Air Station in Miami, Florida. It crashed into the Atlantic Ocean on July 1, 1943, while on a torpedo attack instruction flight. The pilot and his crew all escaped without injury. Pet. App. 22a-24a. The government did not at that time know the specific location of the wreck and did not attempt to find and salvage it. On September 8, 1943, the aircraft was stricken from the inventory of active naval aircraft. *Id.* at 24a.

In 1990, a group of salvors searching for Spanish galleons located what appears to be the aircraft wreck site. Pet. App. 25a. The original finders offered to sell the wreck location for $25,000 to the government's National Museum of Naval Aviation, which expressed interest in the aircraft but concluded that it did not have a budget for the acquisition and refused the salvors' offer. The finders then sold the wreck's location for $75,000 to Windward Aviation, Inc., an Oklahoma Corporation controlled by Douglas Champlin, a private collector of fighter aircraft. *Ibid.*

Champlin offered to enter into an agreement with the naval museum under which he would raise or salvage the aircraft and turn it over to the museum in exchange

for other surplus aircraft under the museum's control. The government again expressed its interest in the aircraft and entered into negotiations with Champlin. No agreement was reached, however, principally because the Navy believed the proposed terms of the in-kind trade were not advantageous, N.R. 12,[1] U.S. Mem. in Support of Motion to Intervene, Exh. 6 (Letter from W.S. Dudley, Dir. of Naval History, to Douglas L. Champlin, President of Historic Aircraft Recovery, Inc. (Jan. 24, 1992)), because it did not have budget authority to make a cash offer of purchase and to undertake a conservation program (Pet. App. 26a), and because it had reservations about the adequacy of the salvor's ability to insure that the aircraft would not be damaged by the salvage operation and subsequent exposure to the air, N.R. 12, U.S. Mem. in Support of Mot. to Intervene, Exh. 8 (Letter from Bernard Murphy, Federal Preservation Officer, to Milan Slahor, Attorney at Law (June 25, 1993) (Murphy-Slahor Letter)).

In 1993, the government stated in correspondence with Champlin's counsel that: (1) the aircraft remained U.S. government property; (2) Champlin did not have permission to salvage the wreck; (3) any intrusion on the wreck could subject Champlin to a civil or criminal suit; and (4) recovery of the aircraft in the absence of an appropriate plan for recovery and conservation would harm the government's interests in preserving a fragile and historic artifact. See N.R. 12, U.S. Mem. in Support of Mot. to Intervene, Exh. 8 (Murphy-Slahor Letter).

2. In August 1994, Champlin filed, as President of Windward Aviation, Inc., an *in rem* action intended to establish his exclusive salvage rights to the aircraft.

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[1] "N.R." refers to the docket entry number of the District Court for the Southern District of Florida.

Pet. App. 27a. During the pendency of the *in rem* action, Champlin conducted a salvage operation in December 1994, recovered a portion of the aircraft's canopy, and brought the canopy within the territorial jurisdiction of the court. *Id.* at 3a-4a.

In February 1995, government counsel learned of the *in rem* action and of the salvage of the canopy, and thereafter again advised Champlin that the government retained ownership of the aircraft and that he had no authority or permission to salvage artifacts from the wreck site. See N.R. 19, Pl.'s Response, Exh. C (Letter from Damon C. Miller, Trial Attorney, to David Paul Horan, Attorney at Law (Feb. 9, 1995)). Government counsel asked Champlin to turn over any salvaged artifacts to the naval museum and dismiss the *in rem* complaint. *Ibid.* On March 2, 1995, Champlin voluntarily dismissed the *in rem* action without prejudice. Pet. App. 27a. He then turned the canopy over to the naval museum and began a new round of negotiations with the government. No agreement was concluded, however.

3. On July 10, 1998, Champlin filed a second *in rem* action against the aircraft. The complaint was filed by petitioner International Aircraft Recovery, LLC, a Nevada corporation controlled by Champlin and the successor-in-interest to the corporate plaintiff in the prior *in rem* action. It sought an injunction barring all persons from interfering with petitioner's "exclusive salvage rights on the aircraft" and either a "full and liberal salvage award" or "title under the American Law of Finds." N.R. 1, Compl. 4. The court issued a warrant of arrest of the aircraft and appointed petitioner as the substitute custodian. Pet. App. 28a. In December 1998, Champlin conducted a second salvage operation. He recovered the aircraft's radio mast and

filmed additional video tape of the wreckage. *Id.* at 28a-29a.

On December 30, 1998, the United States intervened in the *in rem* action and moved to vacate the orders pertaining to the arrest of the aircraft. The government also requested a preliminary injunction barring petitioner from salvage operations and ordering petitioner to return any salvaged parts to the United States. Pet. App. 29a.

At the preliminary injunction hearing, the government adduced testimony from an expert in the deep water salvage of crashed aircraft. He opined that petitioner's salvage plan was inadequate and would result in the destruction of the aircraft. See June 4, 1999 Tr. 27-43. In particular, the government's expert noted that petitioner had not accounted for the stresses that would be placed on the salvage operation by the weight of the aircraft, the water entrained within the aircraft fuselage, and dynamic changes in the load borne by the proposed lift system. He explained that the "positive buoyancy lift system" petitioner intended to employ is notoriously difficult to control and, for that reason, rarely if ever used for deep water salvage operations. *Id.* at 32-33. He reviewed the "cradle" petitioner intended to use in lifting the aircraft and explained that the design failed to account for the substantial possibility that the center of gravity of the aircraft might shift during the operation—a contingency that would twist the airframe against the lifting cables and "probably cut the wings off of the airplane." *Id.* at 34-35. He concluded that petitioner's plan had a "very very minimal, perhaps ten percent" likelihood of successfully recovering the aircraft intact. *Id.* at 39. Petitioner did not offer any direct expert testimony on the adequacy of its salvage plan.

The district court granted judgment in favor of petitioner. The court first concluded that it had subject matter jurisdiction. It reasoned that the claims sounded in admiralty because they implicate questions concerning the salvage of property from navigable water. Pet. App. 31a. It also reasoned that, under *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491 (1998), it could exercise *in rem* jurisdiction to adjudicate the government's interests in property subject to salvage claims where the property is not in the government's actual possession. Pet. App. 31a-32a.

On the merits, the court held that petitioner could go forward with a salvage operation without regard to whether the government had abandoned the property or granted petitioner permission to undertake a salvage operation. It reasoned that issues of ownership and abandonment are secondary to whether the court could protect petitioner's ongoing salvage rights, and that petitioner had a right to continue salvage operations because the aircraft is in maritime peril, because the government had no present means of rescuing the aircraft, and because a "prudent man" would accept salvage services in such circumstances. Pet. App. 38a-39a.

4. The court of appeals reversed. Pet. App. 1a-19a. The court first concluded that the United States had not abandoned all ownership interests in the aircraft, and that the aircraft therefore was not subject to the admiralty law of finds. It explained that this Court and the lower federal courts have consistently recognized that the federal government cannot abandon property absent an affirmative act authorized by Congress and that the government had not expressly relinquished its ownership interests. *Id.* at 7a-10a.

The court of appeals also rejected petitioner's assertion that *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491 (1998), compels a different result by requiring abandonment to be determined under common law standards. The court explained that *Deep Sea Research* concerned property governed by the Abandoned Shipwreck Act of 1987, 43 U.S.C. 2101 *et seq.*, which did not apply to federal aircraft wrecks that were not embedded in the submerged lands of a State, and that none of the parties had argued that the Act applies in this case. Pet. App. 11a. The court concluded that, under the standards applicable to federal property, the government had not abandoned the aircraft by federal statute or duly authorized administrative action, and thus remained the aircraft's owner. *Id.* at 5a-12a.

The court of appeals also rejected petitioner's assertion that, regardless of whether the owner retains an interest in property lost at sea, a salvor has a right to continue salvage operations over the owner's express rejection of salvage services whenever the property in question is in maritime peril. The court explained that the law of salvage is intended to encourage rescue, and that "when a ship is in distress and has been deserted by its crew, anyone can attempt salvage without the prior assent of the ship's owner or master." Pet App. 13a. It further explained, however, that a salvor's right to render immediate assistance in emergent circumstances does not extinguish an owner's right to reject salvage services in instances where no other party's property interests are at stake, and where a timely and effective rejection of assistance is communicated to the salvor. *Id.* at 13a-15a. The court noted that the authors of admiralty treatises agree that owners can reject salvage assistance (*id.* at 16a & n.16), and that "[i]n the context of salvage claims pertaining to historic wrecks,

numerous courts have held that title holders can prevent salvors from raising long submerged vessels." *Id.* at 17a-18a.

The court therefore held that petitioner had no right to continue salvage operations over the objections of the government. It concluded, however, that petitioner may have a claim for monetary compensation for salvage services that may have been rendered before the government made a timely and effective rejection of salvage services. It accordingly remanded the case to the district court for further consideration of a salvage award. Pet. App. 18a-19a.

ARGUMENT

The court of appeals' decision correctly applied well-established principles of salvage law to petitioner's claims. The court's holding that the United States has retained ownership interests in the subject aircraft is consistent with decisions of this Court and other courts of appeals, all of which recognize that the United States cannot be deemed to abandon property absent evidence of an express, duly authorized action relinquishing the government's claims of ownership. Moreover, its holding that a salvor cannot proceed with salvage services over a timely objection from the owner is consistent with decisions of this Court and other courts of appeals. Accordingly, further review is not warranted.

1. The court of appeals' holding that sovereign property can only be abandoned by an express, duly authorized action is consistent with the decisions of this Court and supported by sound considerations of public policy.

a. Petitioner maintains that there is confusion among the courts of appeals regarding the correct standards for determining abandonment of property

lost at sea, and that the express abandonment standard applied by the court below should be rejected in favor of a uniform standard that would encourage salvors to locate and raise lost property. Pet. 15-20.

Those contentions are misplaced. First, the court of appeals' holding on the standards for finding abandonment of sovereign property is consistent with, indeed compelled by, the decisions of this Court. Well settled doctrine rooted in the Property Clause of the Constitution[2] holds that the federal government's interests in property may not be impliedly abandoned, but rather can *only* be relinquished by an express, affirmative renunciation of property rights that is duly authorized by Congress. *United States* v. *California*, 332 U.S. 19, 39-40 (1947); *Royal Indemnity Co.* v. *United States*, 313 U.S. 289 (1941). Accordingly, the case law makes clear that, absent an express act of abandonment, the United States retains ownership of property lost at sea, even after the passage of many years. See *United States* v. *Steinmetz*, 973 F.2d 212, 222-223 (3d Cir. 1992), cert. denied, 507 U.S. 984 (1993); *Hatteras, Inc.* v. *USS Hatteras*, 1984 A.M.C. 1094 (S.D. Tex. 1981), aff'd, 698 F.2d 1215 (5th Cir.) (Table), cert. denied, 464 U.S. 815 (1983). The decision below follows that well-established rule.

Second, although there may be some division among the courts of appeals with respect to the appropriate common law standards for determining the abandon-

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[2] Article IV, Section 3, Clause 2 of the Constitution (Property Clause), states that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

ment of *private* property in admiralty cases,[3] we are aware of no decision of this Court or any other court of appeals holding that the sovereign's property may be deemed abandoned absent an express, duly authorized act relinquishing the government's property interests. Indeed, the decision below is completely in accord with a recent decision of the Fourth Circuit. *Sea Hunt, Inc.* v. *The Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (2000), petition for cert. pending, No. 00-652. The decision below thus does not present an issue that has caused confusion in the lower courts or a conflict in appellate authority.[4]

Finally, contrary to petitioner's contentions, the decision below correctly held that the sovereign retains a right to reject salvage services absent an express abandonment of the property in question. That decision is consistent with sound considerations of public policy and does not present an issue warranting further review by this Court. Insofar as the law of salvage should be construed to afford would-be salvors an economic inducement to find and rescue property lost at sea, those interests are not compromised by the holding below. Indeed, the holding does not disturb the original finder's sale of the wreck's location, and it permits the

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[3] See, *e.g.*, *Yukon Recovery, LLC* v. *Certain Abandoned Prop.*, 205 F.3d 1189 (9th Cir.), cert. denied, 121 S. Ct. 62 (2000); *Columbus-America Discovery Group* v. *Atlantic Mut. Ins. Co.*, 203 F.3d 291, 303-304 (4th Cir.), cert. denied, 121 S. Ct. 277 (2000).

[4] Petitioner states in passing (Pet. 18) that this Court's decision in *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875), requires one uniform standard of abandonment. That decision, however, holds that the admiralty standards must be applied uniformly throughout the country, not that the courts lack the power to establish different standards for the abandonment of sovereign and private property.

district court to consider awarding compensation for salvage services that may have been rendered before the government rejected salvage services. Pet. App. 18a-19a.

At the same time, the decision below protects vital governmental interests in controlling the salvage of its property, particularly military property that may contain the grave sites of personnel or information that implicates national security concerns. The holding ensures that the government cannot be compelled to accept salvage services from a salvor that, in the government's judgment, lacks the resources and ability to safely raise and conserve fragile historic artifacts. In addition, the holding ensures that the government is not compelled by judicial order to pay for salvage operations that are inconsistent with the government's budgetary priorities and discretionary decisions as to how to allocate its finite preservation resources.

b. Petitioner also errs in asserting (see Pet. 9, 19) that the decision below establishes new sovereign immunity principles that conflict with this Court's decisions in *Deep Sea Research*, *supra*, and *The Davis*, 77 U.S. (10 Wall.) 15 (1869). *Deep Sea Research* holds that the Eleventh Amendment does not bar a federal court exercising admiralty jurisdiction from adjudicating claims against state property that is not within the State's actual possession. 523 U.S. at 507. *The Davis* similarly holds that *in rem* proceedings against federal cargo rescued from a sinking, private vessel are not barred if the court's process will not invade the actual possession of the United States.

Petitioner argues that the decision below runs afoul of those principles because the court's adjudication of the sovereign's claim of ownership and attendant right to reject salvage of property is "the functional equi-

valent of granting the United States 'sovereign immunity' from the *In Rem* maritime proceeding." Pet. 8. That contention, however, mischaracterizes the holding below and posits an illusory conflict with *Deep Sea Research* and *The Davis*. Nothing in the court of appeals' decision purports to hold that some principle of sovereign immunity bars a federal court sitting in admiralty from determining claims against sovereign property that is not within the sovereign's actual possession. To the contrary, the court did in fact adjudicate competing claims concerning the property and held, on the merits, that the government retained an ownership interest in the property and therefore had a right to reject salvage services. As such, the decision does not turn on considerations of sovereign immunity and does not in any way conflict with *Deep Sea Research* or *The Davis*.

c. Petitioner's assertion (Pet. 24-26) that the holding below will harm implementation of the Abandoned Shipwreck Act is without merit. The court of appeals found that "[n]either party has argued that the [Abandoned Shipwreck] Act applies in this case, perhaps because the in rem defendant is not a shipwreck and is not 'embedded in the submerged lands of a State.'" Pet. App. 11a n.12. The holding thus does not apply to the Abandoned Shipwreck Act or otherwise implicate questions concerning that Act's meaning or implementation.

2. The court of appeals' holding that an owner of property lost at sea may refuse salvage services is correct and consistent with the decisions of this Court and other federal courts.

a. Under admiralty law, the mere fact that the owner has left sunken property at sea does not mean that he must be deemed to have relinquished all pro-

perty interests in the wreckage. Admiralty law instead draws a distinction between property that is subject to the law of finds and property that is subject to the law of salvage. If the owner of the wreckage has abandoned the property, the wreckage is deemed to have no owner at all and thus becomes subject to the law of finds—a finders, keepers principle. If, however, the property lost at sea is not abandoned, the law of finds does not apply and the rights to the wreckage instead are determined under the admiralty law of salvage. The law of salvage in turn assumes that the property *has* an owner who has not abandoned it, and that the salvor, though entitled to compensation for his efforts in some circumstances, may not act in derogation of the remaining property interests of the owner. See, *e.g.*, *Fairport Int'l Exploration, Inc.* v. *The Shipwrecked Vessel*, 177 F.3d 491 (6th Cir. 1999); *R.M.S. Titanic, Inc.* v. *Haver*, 171 F.3d 943, 962-964 (4th Cir.), cert. denied, 528 U.S. 825 (1999); *Columbus-America Discovery Group* v. *Atlantic Mut. Ins. Co.*, 974 F.2d 450, 459-465 (4th Cir. 1992), cert. denied, 507 U.S. 1000 (1993); *Treasure Salvors, Inc.* v. *Unidentified Wrecked & Abandoned Sailing Vessel (Treasure Salvors III)*, 640 F.2d 560, 567 (5th Cir. 1981).

b. In accordance with those well-established principles and consistent with the ordinary incidents of property ownership, it is well settled that an owner of property in maritime peril may refuse salvage of its property for any reason or no reason. See, *e.g.*, *The Indian*, 159 F. 20, 24-25 (5th Cir. 1908); *Platoro Ltd., Inc.* v. *Unidentified Remains of a Vessel*, 695 F.2d 893 (5th Cir.), cert. denied, 464 U.S. 818 (1983); see generally Martin J. Norris, *The Law of Salvage* in 3A *Benedict on Admiralty* §§ 114-116 (rev. 7th ed. 1997) (collecting cases). Indeed, as one court has noted:

> If the master of a burning vessel prefers to allow her to burn rather than to permit outside parties to extinguish the flames, he may do so. He has a perfect right to decline any assistance that may be offered him: he should not be assisted against his will.

New Harbor Prot. Co. v. *Charles P. Chouteau*, 5 F. 463, 464 (D. La. 1881). Thus, " 'potential salvors' do not have any inherent right to save distressed vessels. Their activities must be subject to the owner's acquiescence." *Jupiter Wreck, Inc.* v. *Unidentified, Wrecked & Abandoned Sailing Vessel*, 691 F. Supp. 1377, 1389 (S.D. Fla. 1988).

The principle that an owner may refuse salvage extends to wrecked vessels and other property lost at sea, even if the property has been lost for many years. Thus, in *Sea Hunt, Inc., supra*, treasure hunters sought an *in rem* order awarding them salvage rights in two Spanish frigates that sank off the coast of Virginia in 1750 and 1802, respectively. Consistent with the decision here, the court of appeals in that case held that: despite the passage of nearly two hundred years, Spain had not abandoned its ownership of the vessels; Spain had expressly communicated its refusal of salvage services to the salvors; and the salvor therefore could not go forward over the owner's objection. 221 F.3d at 638-640, 643-648. Accord *Yukon Recovery*, 205 F.3d at 1197 (noting authority for proposition that owner may reject salvage by a volunteer); *Lathrop* v. *Unidentified Wrecked and Abandoned Vessel*, 817 F. Supp. 953, 964 (M.D. Fla. 1993) (government, as owner of shipwreck embedded in governmental land, may refuse salvage services where salvage operation would interfere with government's management of natural and historic re-

sources); *Jupiter Wreck*, 691 F. Supp. at 1388-1389 (same).

Petitioner suggests that there is a body of case law inconsistent with the decision below, holding that a salvor's right to continue salvage services takes precedence over an owner's right to reject salvage services. None of the cases cited by petitioner (see Pet. 13, 16), however, supports that contention or otherwise casts doubt on an owner's right to refuse salvage services. *Treasure Salvors III*, *supra*, and *MDM Salvage, Inc.* v. *Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F. Supp. 308 (S.D. Fla. 1986), concern the claims of competing salvors and do not address an owner's right to reject salvage services. *Cobb Coin Co.* v. *Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186 (S.D. Fla. 1981), addresses whether the Eleventh Amendment bars the federal court from adjudicating a state's claim of ownership to artifacts salvaged from its territorial waters. And *Legnos* v. *M/V Olga Jacob*, 498 F.2d 666 (5th Cir. 1974), concerns whether a vessel was truly in maritime peril so as to permit entry of a salvage award. The decision below thus does not conflict with any of those cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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